No. 15,190

IN THE

United States Court of Appeals

For the Ninth Circuit

TILLMAN FOSTER ETHERTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of violations of Section 65-9-11 ACLA 1949 and of Section 65-9-10 ACLA 1949. These Territorial felonies were alleged in four different counts of one indictment (District Court Criminal No. 2459) and in two separate counts of a second indictment (District Court Criminal No. 2461). The two indictments were consolidated for trial and trial was conducted on them as consolidated. A verdict of guilty of all counts was returned and the District Court sentenced the Appellant to a sentence of twenty years imprisonment to be served.

After a multitude of proceedings, conducted in both the District Court and in the Court of Appeals, involving various attacks on the imprisonment of the Appellant, the Appellant filed in the District Court denied the said motion and it is from such denial that the Appellant has taken his present appeal.

Jurisdiction below was conferred by 48 USCA 101. Jurisdiction in this Court is conferred by 28 USCA 1291, 2253, and 2255.

In addition to the present appeal, it would appear from pages 3 and 4 of Appellant's Appeal Brief that Appellant has also an appeal pending in the Court of Appeals from the denial by Judge Boldt of the District Court at Tacoma, Washington, of the Appellant's petition for a writ of habeas corpus. The attention of the Court of Appeals is respectfully drawn to the fact that the instant brief and proceeding has nothing to do with the appeal which the Appellant appears to have taken from proceedings conducted in the United States District Court at Tacoma, Washington.

STATEMENT OF FACTS.

Appellant's Statement of Facts, appearing on pages 2, 3, 4, and 5 of Appellant's Appeal Brief, is somewhat scanty. There follows, therefore, a recital of the facts as known by Appellee. In both this connection and in connection with the Argument portion of Appellee's Brief, Appellee has been somewhat handicapped in preparing the Brief due to the fact that the

Clerk of the District Court dispatched all the original papers of the entire case to the Court of Appeals, this being done apparently due to the fact that the Appellant was proceeding in the Court of Appeals in forma pauperis. The absence of all of the District Court's file has been a disadvantage. However, Appellee believed that the best interest of economy, of time, convenience, and money would be served by not delaying the resolution of the appeal by requesting the return to the District Court of the file.

Several of the points relied on by Appellant in his, "Designation Of Points To Be Raised On Appeal" are resolvable on a purely factual basis. As to those certain points Appellee is in dispute with Appellant and Appellee will recite in its own Statement of Facts those facts which it is believed may refute the factual basis on which rests certain of the aforesaid points of Appellant.

Here follows, then, a recital of the facts of the litigation:

The Appellant was indicted in District Court Criminal No. 2459 for contributing to the delinquency of Douglas Shaw in violation of Section 65-9-11 ACLA 1949. This was Count I of the said indictment. Count II of the said Indictment charged the Appellant with sodomy with Douglas Shaw in violation of Section 65-9-10 ACLA 1949. Count III charged that the Appellant contributed to the delinquency of Layton Lee Wiley at Anchorage, Alaska, from the period of May, 1949, to September, 1949, and Count IV charged that the Appellant contributed to the delinquency of Lay-

ton Lee Wiley at Wasilla Alaska, between June, 1950, and August, 1950. This Indictment was filed February 26, 1951.

In District Court Criminal No. 2461, defendant was charged with contributing to the delinquency of one Larry Cox between September, 1949, and June, 1950, at Anchorage, Alaska, in violation of Section 65-9-11 ACLA 1949. In Count II of this last-named Indictment he was charged between the months of September 1949, and June, 1950, at Wasilla, Alaska, with contributing to the delinquency of Larry Cox. This Indictment was February 26, 1951.

On February 27, 1951, a bench warrant was issued. The bench warrant was returned to the District Court on March 1, 1951, and on that date both the Indictments were published. Time for arraignment was set for March 2, 1951. On March 2, 1951, the Appellant was arraigned and asked at that time for the entry of plea to be continued; and the time for entry of plea was set for March 5, 1951. On March 5, 1951, the Appellant appeared with his attorney, William Renfrew, and the Appellant entered a plea of not guilty to all charges comprised in each Indictment.

The case was on March 9, 1951, set down for trial, and the time for trial was set for March 13, 1951. On March 13, 1951, the United States moved to consolidate Criminal No. 2459 and Criminal No. 2461, and on the same date the cases were consolidated. The Minute Order of the District Court showing such consolidation is found in Vol. 24, General Journal, page 29, and is as follows:

"In the District Court for the Territory of Alaska
THIRD DIVISION

No. 2459 Cr.

United States of America, Plaintiff,
vs.
Tillman Etherton, Defendant.

ORDER

This matter having come on for hearing upon the motion of the United States of America, plaintiff, for an order consolidating Criminal Cause No. 2461, entitling United States of America, plaintiff, vs. Tillman Etherton, defendant, with this action, Criminal Cause No. 2459, on the grounds and for the reason that the crimes charged in both indictments are similar and occurred during the same period of time and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that Criminal Cause No. 2461 be consolidated for trial with Criminal Cause No. 2459.

"Signed in open Court at Anchorage, Alaska, this 13th day of March, 1951.

Anthony J. Dimond
District Judge"

On Appellant's motion of March 13, 1951, the District Court excluded the public from the courtroom, Trial commenced March 13 and lasted through March 14, 1951, when the case went to the jury.

On March 15, 1951, the verdict was returned by the jury and at that time the Appellant appeared with his attorney, Evander Smith. The jury found the Appellant guilty of Count I, Count II, Count III and Count IV of Criminal No. 2459. The jury also found the Appellant guilty of Count I of Criminal No. 2461 and Count II of Criminal No. 2461. Time for entry of sentencing was set for March 20, 1951. The file of the District Court shows that a transcript of proceedings in connection with plea and sentencing was filed on March 24, 1951, in Criminal Nos. 2459 and 2461.

The Appellant appeared at the time of sentencing with his attorney, William Renfrew. The Court imposed sentence on Count I of two years, on Count II of ten years to run successively, on Count III of two years to run successively, and on Count IV of two years to run successively.

The Appellant also received sentence of two years on Count I and one year on Count II to run consecutively as to Count I, sentence on both counts to begin at the expiration of the sentence imposed on Count IV in Criminal No. 2459—a total of twenty years to serve.

On March 10, 1952, approximately a year after his conviction, Motion to Vacate and Set Aside Judgment and Sentence was filed by Appellant with the District Court. Appellant contended therein that he had been unlawfully sentenced and that he had been twice put in jeopardy. He contended that both Indictments al-

leged the same offense charged in Count II of the first Indictment, and he further alleged misconduct on the part of the United States Attorney. On March 14, 1952, the District Court entered a minute order denying the Motion to vacate and set aside the judgment.

On April 16, 1952, the Appellant filed a motion in the District Court for permission to appeal to the Ninth Circuit Court of Appeals from the denial of his petition in District Court. On May 8, 1952, the District Court denied his application for permission to prosecute an appeal for the reason that the District Court's permission was not necessary.

On August 12, 1952, Appellant petitioned the District Court for probation. On August 22, 1952, the District Court denied his petition for probation. On March 21, 1953, Appellant again petitioned the Court for probation.

On July 16, 1954, Appellant made an application to vacate and set aside the judgment of sentence. At this time Appellant contended that he was not prosecuted in a "United States District Court," and cited *Reese v. Fultz,* 13 Alaska 227, 96 F. Supp. 449. Appellant further contended that the Indictments were bad because the "seal" of the District Court was not proper, and that there were grounds to cause the sentence to be set aside, but the remainder of the petition is not understandable to the Appellee.

On July 22, 1954, a petition was filed in the District Court demanding a transcript of the evidence and exhibits. This petition was supported by an affidavit

in forma pauperis. On July 23, 1954, the District Court entered a minute order denying the July 16, 1954, application to vacate and set aside the judgment and sentence for the reason that a previous motion had been filed and denied. On August 5, 1954, the Appellant filed a notice of appeal in the District Court from the Court's order (of August 2). A minute order of August 5, 1955, denying the application to proceed in forma pauperis was filed. A minute order of August 26, 1955, denying motion to proceed in forma pauperis was filed.

On September 18, 1954, a minute order was entered denying the petition for appeal. The District Court file shows an application for permission to appeal in forma pauperis, dated November 1, 1954. In Miscellaneous No. 390 of the Court of Appeals, the Court of Appeals denied the application of appeal in forma pauperis. On July 14, 1955, the Appellant made a new motion to proceed in forma pauperis in the District Court. Filed also at that time was a motion for personal appearance in an application for writ of error coram nobis, to vacate and set aside the judgment and sentence of commitment. This application of the petitioner contended that the sentence was inconclusive and vague. The remainder of the application is not clear. On August 5, 1955, the District Court denied the motion to appeal in forma pauperis and the motion for the petitioner's personal appearance and for a writ of error coram nobis.

On August 23, 1955, the Appellant made an application in the District Court to proceed in forma

pauperis. This application was denied on August 26, 1955. On September 6, 1955, he made a new application to appeal in forma pauperis. On September 23, 1955, this application was heard and decision was reserved. On October 14, 1955, the District Court granted a motion for extension of time to pay filing fees of $5.00.

On March 29, 1956, the Appellant filed in District Court an affidavit and motion to proceed in forma pauperis and also a motion to vacate and set aside the judgment and sentence of commitment and motion for personal appearance of the Appellant. The said Motion to Vacate was founded on the following four grounds:

1. The conduct of the original trial on two separate indictments without consolidation thereof.

2. The utilization of the same offense on which to found two separate counts (Appellant was here referring to Count I and Count II of District Court Criminal No. 2461).

3. Harmful consequences stated to have been suffered by Appellant due to the failure of the District Court to make the consolidation of the two indictments.

4. Incompetence of Appellant's counsel at the original trial.

On May 18, 1956, the District Court denied the said Motion to Vacate, and on June 19, 1956, denied Appellant's Motion for Leave to Proceed in Forma Pauperis. On July 6, 1956, the District Court signed

and entered in the Journal a formal order denying the previously mentioned Motion for Leave to Proceed in Forma Pauperis. Also, on July 19, 1956, the District Court denied a motion for a Certificate of Good Faith, a Motion for Habeas Corpus, and for Personal Appearance of the Appellant.

As previously stated in this Brief, the judgment appealed from in the instant Appeal is the District Court's denial of Appellant's Motion to Vacate, such denial being dated May 18, 1956. Not having the Court file at hand, Appellee is unable to state whether a formal order denying Appellant's Motion to Vacate was executed by the District Court. Appellee is of the opinion that probably there was not such a formal order made. There was, however, a minute order recorded in the District Court Journal showing the action taken by the District Court in open Court. This minute order is found in the District Court's General Journal Vol. 46 at page 100. It is quoted verbatim as follows:

"Nos. 2459 Cr. and 2461 Cr.

"HEARING ON MOTION TO PROCEED IN FORMA PAUPERIS: MOTION TO VACATE AND SET ASIDE JUDGMENT, SENTENCE AND COMMITMENT, AND FOR PERSONAL APPEARANCE OF DEFENDANT

"Now at this time, these causes coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to-wit:

"Now at this time Hearing on Motion to Proceed in Forma Pauperis; Motion to Vacate and Set Aside Judgment, Sentence and Commitment and For Personal Appearance of Defendant in Cause Nos. 2459 Cr., entitled United States of America, plaintiff, versus Tillman Foster Etherton, defendant, and 2461 Cr., entitled United States of America, plaintiff, versus Tillman Foster Etherton, defendant, came on regularly before the Court, the Government represented by James M. Fitzgerald, Assistant United States Attorney, defendant not present nor represented by counsel, the following proceedings were had, to-wit:

"Argument to the Court was had by James M. Fitzgerald, for and in behalf of the Government.

"WHEREUPON, Court having heard the argument of counsel, and being fully and duly advised in the premises, denied motion to proceed in forma pauperis; denied motion to Vacate and Set Aside Judgment, Sentence and Commitment; and denied motion for the Personal Appearance of the defendant."

POINT RAISED BY APPELLANT.

(In order that the Court may more readily apprehend the several points on which the Appellant appears to be relying, Appellee has undertaken to list Appellant's principal points at this place in the Brief. These points of Appellant the Appellee has gleaned from the Appellant's "Designation of Points to be Raised on Appeal" and from sources cited therein.)

1. Conduct of the original trial on two separate indictments without consolidation thereof. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

2. Utilization of the same offense on which to found two separate counts, to-wit: Count I and Count II of District Court Criminal No. 2461. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

3. Harmful consequences to Appellant due to the non-consolidation claimed above in Point No. 1. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

4. Incompetence of Appellant's counsel at the original trial. (Page 5 of Appellant's Motion to Vacate denied May 18, 1956).

5. Unconstitutionality of Section 65-9-11 ACLA 1949 based on:

a. Vagueness and indefiniteness. (Proposition I on page 1 of Appellant's "Supplemental Brief", same being also captioned "Amended Brief").

b. The factor that the punishment level of the statute extends from misdemeanor to felony, cutting across the line separating the two types of criminal behavior, thus working a denial of equal protection of the law by permitting a misdemeanor level of punishment against one defendant and a felony level of punishment against another defendant. Proposition II on page 5 of Appellant's "Supplementary Brief", same being also captioned "Amended Brief").

c. The factor of unconstitutional delegation of legislative power involved in a punishment ambit

which spreads across both misdemeanor and felony areas. (Proposition III on page 12 of Appellant's "Supplementary Brief", same being also captioned "Amended Brief").

6. Non-adjudication on the merits of the Motion to Vacate denied May 18, 1956. (Ninth and tenth lines, page 4 of Appellant's Motion to Vacate denied May 18, 1956).

ARGUMENT.

I.

THE APPEAL SHOULD FAIL BECAUSE APPELLANT, AS TO EACH OF THE POINTS RAISED BY HIM ON APPEAL, IS ATTEMPTING TO MAKE A 2255 PROCEEDING PERFORM THE OFFICE OF A WRIT OF ERROR OR AN APPEAL.

Appellee's position under this Proposition is that, without exception, all of the points relied on by Appellant are matters which could, and should, have been raised by Appellant by way of writ of error or appeal and cannot be raised in a 2255 proceeding.

It is of course true that the first sentence of Section 2255 permits an attack on a sentence if the same was imposed "in violation of the constitution or laws of the United States" but by the use of such language the Congress did not at all intend to permit a defendant to "gamble on the verdict", covertly remaining silent on trial defects known by him to exist, or knowledge of which is chargeable to him, and months and years later attack the judgment and sentence on such

grounds. *Howell v. United States,* 172 F. 2d 213 makes the following observation at 215:

> "Furthermore, all of Appellant's complaints relate to matters which, if based upon fact, should have been called to the attention of the court at the trial and made the subject of timely appeal from its judgment, not raised by habeas corpus or by a motion questioning collaterally the validity of the proceedings leading to conviction. It is elementary that neither habaes corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U. S. C. A. 2255. *Birtch v. United States,* 4 Cir., 164 F. 2d 880; *Pifer v. United States,* 4 Cir., 158 F. 2d 867; *Eury v. Huff,* 4 Cir., 141 F. 2d 554; *Sanderlin v. Smyth,* 4 Cir. 138 F. 2d 729; *United States v. Brady,* 4 Cir., 133 F. 2d 476, 481."

It will thus be seen that when the Congress spoke in Section 2255 of sentences in violation of constitution or federal statutes the kind of constitutional travesty intended was the denial of the substance of a fair trial. Here the Appellant has, at scattered points in the documents constituting the appeal, merely claimed in general terms various general violations of his constitutional rights. Such general state-

ments, unsupported by the record, are not sufficient to vest Appellant with the right to proceed in the form of a Section 2255 action.

Furthermore, the unconstitutionality referred to in the first sentence of Section 2255 is unconstitutionality under the United States Constitution, whereas in this appeal Appellant is chiefly alleging the unconstitutionality not of a law of the United States but the unconstitutionality of a territorial statute, namely, Section 65-9-11 of ACLA 1949.

The generalization can be made that the only sort of error in a sentence which can be relied on in a 2255 proceeding is such error as would make the judgment of sentence void and subject to collateral attack. Unless objections are made at the trial they cannot be heard for the first time on appeal from an order denying a motion to vacate the sentence. *Wallace v. U. S. C. A.* 8, 1949, 174 F. 2d 112 certiorari denied 69 S. Ct. 1505, 337 U. S. 947, 93 L. Ed. 1749, rehearing denied 70 S. Ct. 30, 338 U. S. 842.

An examination of each and every one of the points raised by Appellant in this appeal will disclose that each of them could have been raised at the original trial, but was not so raised, as shown by the record. See also page 93, Footnote 63.1 to Section 2306 of 1956 Pocketpart, Barron and Holtzoff, Federal Practice and Procedure.

II.

THE MATTER URGED BY APPELLANT IS NON-APPEALABLE AND LIES WHOLLY IN THE SOUND DISCRETION OF THE DISTRICT COURT ON ACCOUNT OF THE FACT THAT THE PRESENT CLAIM FOR RELIEF IS SIMPLY A SUCCESSIVE OR REPEATED CLAIM FOR SUCH RELIEF. BUT EVEN IF IT BE CONSIDERED THAT NEW GROUNDS FOR VACATING THE SENTENCE, NEVER PREVIOUSLY URGED, ARE RAISED BY THE APPEAL, NEVERTHELESS THE MOTION TO VACATE AND THE RECORD, AND THE FILES OF THE CASE CONCLUSIVELY SHOW THE PRISONER IS NOT ENTITLED TO ANY RELIEF.

Appellee cannot state definitely and absolutely that all of the grounds relied on by Appellant in the present appeal have already, in the long history of this case, been raised and denied; but Appellant himself states in his appeal documents that he has made approximately five distinct and successive motions to vacate the sentence all of which have been denied, and therefore the probability is great that all of the grounds now raised in the instant appeal have at some time in the past been raised and disposed of. It is not possible to speak more definitely on the matter due to the fact that the entire District Court file is now in the hands of the Court of Appeals and therefore, not open to examination at Anchorage, Alaska by Appellee's counsel.

The law, however, seems to be reasonably clear that the disposition of a 2255 proceeding is entirely within the sound discretion of the trial court when the 2255 raises no new ground of attack. See footnotes 39, 39.1, and 39.2 to Section 2306, at page 107 of 1956

Pocketpart, Barron and Holtzoff, Federal Practice and Procedure.

Also, it appears to be equally well established that if the new 2255 motion *does* raise new grounds then the prisoner is entitled to no relief where the prisoner's own motion, the record, and the files of the case conclusively show the prisoner not to be entitled to any relief. For authorities, see idem. Appellee believes that there is just such a situation in this case.

III.

ALL OF APPELLANT'S POINTS ALLEGING FAILURE OF THE DISTRICT COURT TO CONSOLIDATE THE TWO INDICTMENTS OR BASED UPON AN ALLEGED FAILURE OF CONSOLIDATION, ARE INSUPPORTABLE ON THE FACTS.

See Points Raised by Appellant, ante, in this Brief. Two of the points raised by Appellant on this appeal, namely, Points 1 and 3 of the Points Raised by Appellant, relate to an alleged non-consolidation by the trial court of the two indictments. This is not a subject matter of law. It is matter of fact. Appellee's position is that as a matter of fact the District Court *did* consolidate the two indictments. A recital of such fact has, therefore, been included by Appellee in that portion of Appellee's Brief denominated Statement of Facts, to which the Court of Appeals is respectfully referred.

IV.

APPELLANT'S CONTENTION THAT THE TWO COUNTS COMPRISING THE ORIGINAL INDICTMENT NO. 2461 STATED THE SAME OFFENSE IS UNSOUND.

Analysis of the No. 2461 original indictment discloses that on its face the only perceivable difference between the two counts is that in Count I a crime is alleged to have been committed "at or near Anchorage" while in Count II a crime is alleged to have occurred "at or near Wasilla, Alaska".

The Court of Appeals may judicially notice that the town of Wasilla, Alaska, is geographically located approximately 45½ miles by railroad from Anchorage, Alaska, and approximately 70 miles by the highway from Anchorage.

Now it must be admitted that mere geographical separateness of the two towns would not in and of itself create separate offenses if the fact showed that the two events bore a reasonable affinity in time, and were part of a unity of action. It is universally recognized that if an individual goes into a building and therein steals property from several persons on a single occasion connected within reasonable boundaries of time, such person has not committed several larcenies but has in fact committed but one larceny from several persons. It is certainly theoretically possible for a contribution to commence in Anchorage and terminate in Wasilla, Alaska, or vice versa, and the fact that the crime took place in two different towns would not make two offenses of it. It would be in such a case but one offense.

But in this instance the factual background is not available. Appellant, of course, could have raised this point at the trial and could have presented the factual circumstances which, conceivably, might have shown that there was but one crime taking place in two cities. However, he did not do so.

There is, Appellee believes, nothing in the record to supply the factual foundation on which this question can be absolutely and definitely determined. In this connection, it also should be pointed out that the Appellant has in no way attempted to show to the Court of Appeals what facts he would adduce in order to show that there was in fact but one offense.

In this posture of the matter, an appellate court cannot do aught but look to the face of the indictment itself for a determination of whether one offense or two offenses were stated; and when the Court does look to the face of the indictment itself, it will be seen that by the allegation of situs in quo the two counts are distinct, and alleged distinct crimes, the crime of Count I occurring in a different city from that crime alleged in Count II.

V.

A 2255 PROCEEDING IS NOT THE PROPER VEHICLE WITH WHICH TO ATTACK A SENTENCE ON THE GROUND OF INCOMPETENCE OF COUNSEL. BUT IF IT WERE, THE RECORD ITSELF FURNISHES CONCLUSIVE EVIDENCE OF THE COMPETENCE OF THE APPELLANT'S COUNSEL AT THE ORIGINAL TRIAL.

Appellant believes that no more is required to support the above proposition than the mere citation of the following: *Walker v. U. S.,* CA 7, 1955, 218 F. 2d 80; *Hendrickson v. Overlade,* Dist. Ct., Ind., 1955, 131 F. 2d 561; *U. S. v. Malsetti,* Dist. Ct., New Jersey, 1954, 125 F. 2d 27, affirmed 213 F. 2d 728.

VI.

APPELLANT ERRS IN HIS CONTENTION THAT SECTION 65-9-11 ACLA 1949 IS UNCONSTITUTIONAL.

If the Court will refer to Points Raised by Appellant, ante, it will be seen that the attack on the constitutionality of this territorial statute is based on vagueness and indefiniteness, on the factor that the punishment level embraces both the area of misdemeanor as well as the area of felony; and on the asserted unconstitutional delegation of legislative power by virtue of a punishment ambit which spreads across both misdemeanor and felony areas.

Appellee's research does not disclose that the question of the constitutionality of this territorial statute has been determined, nor has any case declaring its unconstitutionality been called to our attention.

Taking the grounds of unconstitutionality asserted by Appellant seriatim, let us first examine the question of whether the statute is vague and indefinite. A careful reading of the statute indicates that while it is broad in its inclusionary terms, it is clear and definite with respect to the type of conduct proscribed. The purpose of the statute, as is obvious, was to insulate those of tender years from harmful influences. To that end the statute prohibited any conduct which would contribute to the delinquency of a minor. In view of the legislative objective and the nature of the crime and the purpose and intent of the statute, it is difficult to perceive how any greater definiteness could have been achieved.

Appellant next urges the unconstitutionality of this statute on the ground of the denial of equal protection of the law, based on the fact that the statute would permit one person convicted thereunder to be punished as for a misdemeanor and would permit another person found guilty under the same statute to be punished therefor as for a felony. What Appellant appears to be saying is that whenever a statute prescribes certain limits of punishment it becomes invalid because one person can be punished at the minimum level of the statute while another person may be punished at the maximum level of punishment permitted by the statute. In Appellee's conception this does not create any denial of equal protection of law. Differences in actual punishment received by different persons when such punishment is administered within the established statutory limits for punishment is but an

inevitable product of the judicial process and of the function of the judge in weighing nicely all of the manifold factors which should be taken into consideration in assessing the precise quantum of punishment. If Appellant's contention was sound then thousands, nay, hundreds of thousands, of statutes would be stricken from the codes of the various states since it is quite a common legislative practice—and indeed an altogether wise and humanitarian one—to provide for each crime certain limits of minimum and maximum punishments.

Appellant is, of course, correct in his suggestion that there is a difference between misdemeanors and felonies in the law of Alaska. The statute setting forth the distinction is Section 65-2-2 ACLA 1949. The significant words of that statute are that a felony is a crime which, for our purposes, "is or *may be* punishable by imprisonment in the penitentiary". Appellant is also correct in his assertion that there are certain harmful legal consequences to a conviction of felony. The statute which creates the suspension of civil rights during imprisonment in the penitentiary for a felony is Section 65-2-9 ACLA 1949.

However, Appellee is unable to discern any reason why the mere fact that the punishment power extends across the line separating misdemeanors from felonies is any reason for invalidity of the statute on the ground of equal protection of law.

Lastly, Appellant urges the contention that because the punishment power is spread across the line separating misdemeanors from felonies an unconstitu-

tional delegation of legislative power occur. What Appellant has overlooked is the fact that the statute does not—repeat not—give to the trial judge the determination of whether the offense is a felony or not. On the contrary, the legislature has expressly made a violation of the statute a felony. This will be seen clearly in the ninth line of the territorial statute wherein it specifies that one who has contributed to the delinquency of a minor *"shall be guilty of a felony"*. It is thus seen that the legislature has not delegated to the trial judge the determination of whether a violation of the statute is a misdemeanor or a felony because the legislature itself has pronounced the violation to be a felony. All that the legislature has done is to permit the trial judge to impose punishment in a federal jail for less than a year, if the trial judge sees fit. This does not reduce the offense to a misdemeanor. It remains, statutorily, a felony.

As stated, it is a felony by express statutory pronouncement. The only discretion vested by the legislature in the trial judge and, of course, delegated to him, is the discretion to determine the duration of the punishment up to two years. If a District Court should punish an offender under this statute by imprisonment for six months in the federal jail the act of the trial judge in so doing would not constitute the reduction of the offense to a misdemeanor. It would merely mean that the offender in question was being punished for a felony by punishment which is ordinarily accorded to misdemeanors.

VII.

WITH RESPECT TO HIS MOTION TO VACATE APPELLANT RECEIVED AS MUCH OF A HEARING ON THE MERITS AS THE LAW AND THE FACTS ENTITLED HIM TO RECEIVE.

In the minute order set forth in extenso in the Appellee's Statement of Facts, ante, the hearing held on Appellant's motion to vacate is described. It is shown by the said minute order that the United States was represented by an Assistant United States Attorney and that an argument was had and that the Court was fully advised in the premises; and that after being so advised and being fully conversant with the matter the said motion to vacate was denied.

It is true, as Appellant points out, that Appellant was not present at this hearing. However, as the Court of Appeals knows, the presence of the prisoner is not required inasmuch as Section 2255 provides as follows:

> "A Court may entertain and determine such motion without requiring the production of the prisoner at the hearing".

Appellee's position on this point is simply that there was as much of a hearing as the law and facts admitted of and to the extent that they justified; and that even if no hearing had been held this appeal should fail on the basis that where the motion to vacate itself, the files and the record of the case conclusively show that the prisoner is not entitled to any relief, there is no occasion for a hearing. See the text of the 1956 Pocketpart of Barron and Holtzoff, Federal Practice and Procedure, at page 102, and the authorities collected in footnote 15 thereat.

CONCLUSION.

Appellant cannot be allowed to ameliorate what may, possibly, have been a severe sentence (as to which Appellee's present counsel is ignorant) by the selection of the wrong vehicle, in this instance, a 2255 proceeding. All of the points, separately and severally, on which Appellant relies are not only without merit but also consist of matter which could have been and should have been, raised at the trial, but which were not. Appellant was represented by competent counsel at the original trial and the fact that points in this appeal were not raised at the trial is probably some indication of their lack of merit. Appellee therefore, requests the Court of Appeals to affirm the minute order of the Court below constituting the judgment from which this appeal has been taken.

Dated, Anchorage, Alaska,
October 5, 1956.

Respectfully submitted,

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